Supreme Court of the United States

OCTOBER TERM, 1945.

No. 1034.

GEORGE F. DRISCOLL COMPANY, *Petitioner*,

v.

THE UNITED STATES.

MOTION FOR LEAVE TO SUBMIT BRIEF AS AMICUS CURIAE AND BRIEF OF ALLEN POPE, Amicus Curiae.

On Petition for Writ of Certiorari to the Court of Claims.

ALLEN POPE,
amicus curiae.

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MISCELLANEOUS.

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Submitted with consent of

The Honorable J. HOWARD MCGRATH, *Solicitor General of the United States, for respondent.*

ARTHUR J. PHELAN, Esquire, *for petitioner.*

Comes now Allen Pope, and, having consent of both parties herein, respectfully requests permission to submit the following brief as an *amicus curiae.* He has special interest in the principles here involved as they apply to two pending cases in which he is litigant as appears next below.

Your *amicus* is not a member of the bar of this Court. In such respect his brief may not meet precisely the require-

ment of Rule 27, par. 9. He is a contractor for engineering construction. He has two pending cases involving the important and novel principles at issue in this case, *i. e.*, in what it purports to decide and how it was decided. In each such case, he now represents himself. Both of his pending cases, as also this case, are claims against the United States for work performed upon its requirement, of which it has received the benefit, but for which it has not paid. One pending case, No. 46476 in the Court of Claims turns on similar contract provisions, especially with respect to Article 15, *Disputes*. There, as here, the issue stems from the power, or lack of it, of administrative officials to decide conclusively points of law arising from a contract. It is also observed that one judge is still absent from the court. As to this circumstance see post p. 3. The other pending case, No. 45704 below, No. 520 present term here, involves similar issues of substantive law, but the most important aspect is the similarity of procedure, the issue of adjective law, whereby judgment was given by a majority of three, one of whom did not hear the oral argument, was absent from the court for nearly three years; it being remembered that in that court the *nisi prius* is the court, and that no review may be had except by certiorari here. Motion for leave to file, and a second petition for rehearing therein are nearly ready for submission. Thus far the interest herein of *amicus* in respect of his own cases.

BRIEF OF ALLEN POPE, AMICUS CURIAE.

The thesis of this brief is sufficiently observable in the conclusion hereto to which reference is respectfully made in order to save repetition.

STATEMENT.

The proceedings below were as follows: Four of the five judges of the Court of Claims heard the case argued on October 4, 1944. All of the five judges were qualified and

had jurisdiction to hear, determine, and render judgment. The fifth judge did not hear the oral argument. He was absent from the trial. He was absent from the court for nearly three years and did not return until June 30, 1945, when the court was in summer recess. "Any three of the judges of said court shall constitute a quorum, and may hold a court for the transaction of business; *Provided*, That the concurrence of three judges shall be necessary to the decision of any case." 18 Stat. Chap. 468; United States Code, 1940 Edition, p. 2514, § 243 (Judicial Code Section 138). U. S. C. A. is misleading. The four judges who heard the oral argument disagreed on a point of law which two of them considered decisive of the case such as to warrant dismissal. They held that, right or wrong, the decision of the administrative official, purportedly made under authority of Article 15 of the contract, was conclusive upon the court (R. 33). The said Article 15 provides that all questions arising under the contract shall be determined by the contracting officer (R. 14). As matter of law, the contracting officer decided that petitioner was not entitled to be paid. The said two judges upheld this decision of the officer (R. 33). They also drafted Special Findings of Fact.

For nearly a year, three judges could not concur. The fifth and theretofore absentee judge was called in. He was also called in in three other cases, of which one was that of *amicus*, and where, likewise, the quorum of four which heard them stood divided two and two. These were cases No. 45,596, *Minette G. Stein* v. *The United States;* No. 45,704, *Allen Pope* v. *The United States;* and No. 45,889, *Pennsylvania Company et al* v. *The United States.* Without giving any notice to the parties or opportunity to be heard before the full bench or before the deciding judges, the court on October 1, 1945, decided all these cases against the claimants, and did so by means of the vote of the theretofore absentee judge as supplying the requisite third vote for concurrence. In the meantime and prior to October 1, 1945, one of the other judges who dissented was given an outside ad-

ministrative assignment not connected with the court and is still absent thereon.

The court, or a minority thereof, could have certified the disputed issue of law to this Court for decision under authority of the Act of February 13, 1925, Sec. 3 (a), Rule 40, but they did not (See post p. 8). They had the same power to certify the questions in the other three cases above mentioned, where, also, the quorum of four was divided two and two, but they did not use it. Instead, they referred the matters to the absentee judge. In effect, he decided them all in that his vote brought about the judgments of dismissal.

In the instant case, the theretofore absentee judge concurred in the result, *i.e.*, in the judgment of dismissal. He gave as ground his own statement of fact and his own and different conclusion of law. Neither his fact nor his law was sustained by any evidenciary finding, and was not concurred in by any other judge. The two remaining judges dissented on points of law, contending that petitioner was entitled to be paid. Each wrote a dissenting opinion. The judgment is that the petition be dismissed; but, by reason of the divergence of grounds, the law of the case is not made.

The Special Findings of Fact as incorporated in the judgment may be questioned as to their validity and as to whether actually they are findings in the following respects. No concurrence thereto is expressly indicated. Neither has the court stated, as is its custom, *The Delaware, Lackawanna & Western Railroad Co.* v. *The United States*, 54 Ct. Cls. 35, 38, that the facts as thus found were based on the evidence, on the report of a commissioner, and upon being "heard" by the court. One judge, who ordered dismissal, did not hear the oral argument. That fact bears upon the issues of "hearing" and of the validity of the judgment. See Discussion post p. 9. On the other hand, no judge recorded any opposition to the findings as written.

The pertinent essence of the Special Findings of Fact as set out is as follows (R. 22-31):

Petitioner, under a contract drafted on Standard Government Form No. 10, agreed to construct a building at Ellis Island. He agreed to maintain the water supply when making piping installations. He also agreed to be responsible for damage resultant from his fault or negligence. He agreed to drive some small piles for the support of a covered passage-way, the same to be spaced 6 feet apart and in the locations shown on the contract plan. The piles were specified to be driven, not by length, but to a designated "bearing value" determined from a formula and to be computed by the government's representative as the piles were continuously driven in his presence. The location and depth of the underground water main as it crossed the site of the covered passageway were not definitely known. The Government possessed whatever knowledge there was in such respects. There was no express contractual provision requiring petitioner to explore for the pipe.

When, in the course of the pile driving pursuant to the contract plan, a pile was about to be driven in the vicinity where the underground pipe was thought to be, the contractor asked the Government's representative for instructions. The latter decided to move the location of the pile 2 feet 6 inches from the location agreed in the contract and shown on the plan. Following his instructions, the petitioner, having dug a trench five feet deep at the changed location, probed in the bottom thereof at intervals of 4 inches using a steel rod 12 feet long and allowing 6 inches for hold. The contractor thus probed to depths of 16 feet 6 inches below the surface of the ground. The underground pipe was not found.

The Government's representative thereupon designated the changed location by a stake; ordered the contractor to drive the pile thereat; supervised the driving; and directed the contractor when to stop driving. There was then no

indication that the pile had caused damage. Subsequently, the water pressure began to drop and the following morning there was no pressure. Thereupon, the government's representative ordered the contractor to excavate for purposses of investigation and repair. The contractor proceeded as directed, but immediately, in writing, requested reimbursement for the outlay being incurred. The Government's representative by letter confirmed his order to do the work.

The pipe was found damaged at a depth of 16 feet 9 inches below the ground, or 3 inches below the probings. The pipe would not have been damaged had the Government's representative permitted the pile to be driven in the agreed location as shown on the plan. The pipe was repaired and the water supply maintained as directed. The contractor followed instructions in all respects. The total expense was as the findings show which corresponds with the pleading.

Article 15 provided for decision by the contracting officer of all questions arising under the contract. After performance of the work upon his requirement and with full daily knowledge of the expense being incurred, the contracting officer, upon the authority of this Article 15, decided that the contractor was responsible. He so held notwithstanding that the Government, of its own decision, changed the location shown by the plan and actually directed the damage being done by requiring the pile to be hammered into position as it was. In such respect to the contrary see *Richard Wood et al* v. *City of Fort Wayne*, 119 U. S. 312. *Roettinger, Administrator of Clark* v. *The United States*, 26 Ct. Cls. 391. *Six Companies* v. *The United States*, 85 Ct. Cls. 687, 697. *Ambursen Dam Co.* v. *The United States*, 86 Ct. Cls. 478, 511. *Christensen Const. Co.* v. *The United States*, 72 Ct. Cls. 500, 516. *Callahan Const. Co.* v. *The United States*, 91 Ct.Cls. 538, 635. *Freund* v. *The United States*, 260 U. S. 60. This issue of law is not presently before the Court because the law of the case is not made.

REASONS WHY CERTIORARI SHOULD BE GRANTED

The judgment of dismissal *as it stands below* is a final judgment. In such respect, the case is within the jurisdiction of this Court. The judges disagreed as to the law. The judge, whose vote supplied the necessary third concurring vote, concurred only in the result, *i.e.*, the judgment of dismissal, and set out his own idea of fact and law. Wherefore, the law of the case is not made, and there is nothing here to review by way of issue of substantive law, *Fenstermaker* v. *Tribune Publishing Co.*, 12 Utah 430, 13 Utah 562, 35 LRA 611. *Burr* v. *Des Moines Co.*, 1 Wall. 99, 102.

It is questionable also whether the Special Findings of Fact as asserted are made in accordance with rules of court and law, *ante* p. 4, and whether, in such respect, any items of substantive law may be raised therefrom. *Burr* v. *Des Moines Co.*, 1 Wall. 99, 102, 103. However, since the disputes of the judges below turn entirely upon the meaning of the contract and since the lower court has sent up the contract as part of the record in the case, this Court may find as fact what the contract provisions were by virtue of the Act of May 22, 1939, amending the Act of February 13, 1925, and thereupon construe the same and direct the lower court to proceed and to render judgment accordingly. *The United States* v. *Esnault cases.* For such ground could not certiorari be granted?

When the Congress, upon the representations of members of this Court, "abolished" the right of appeal to the Supreme Court from judgments of the Court of Claims and substituted, in lieu thereof, a review on certiorari by Section 3 (b) of the Act of February 13, 1925, it was intended and expected that the Court of Claims would make use of Section 3(a) thereof and certify to this Court questions of law concerning which instructions were desired *for the proper disposition of a case.* While that authorization appears merely permissive in aid of the court, not obligatory, it was not intended that rights of claimants in that

court to the fundamental American tradition of having at least one review of their cases should be completely forfeit. It was intended that by the combination of certification and certiorari some of the essentials of the individual's rights to review should be retained. Every question in the Court of Claims, as a court of first instance, which might warrant review in a higher court, if there were such, is not a question of great national importance to be in the category of cases reviewable here. Thus it is possible, by the refusal or failure of the Court of Claims to decide or to certify, to squeeze out entirely, forever, what the Congress considered as the fundamental American rights of litigants even in that court.

It seems, from the language of the Act and from the testimony given at the hearings in Congress thereon, that in abolishing the right of appeal, it was intended that some balance be observed between certification and certiorari such as to "preserve" so much of that traditional American right to at least one review as would provide "for the proper disposition of a case". See testimony of Mr. Justice Sutherland, Senate subcommittee of the Committee on the Judiciary hearings on S. 2060, 68th Congress, 1st Session, February 2, 1924, p. 37 thereof; also pp. 38, 39, 47, Senator Spencer, Mr. Justice Van Devanter, Mr. Justice Sutherland. See also other hearings and reports in connection with this Act, e. g., Serial 45 Judiciary Com. House of Representatives on H. R. 8206, 68th Cong., 2nd Session, December 18, 1924, pp. 15, 17, note especially Mr. Sumners, Mr. Justice Van Devanter. Also see Senate Report No. 362 on S. 2060, 68th Cong., 1st, April 7, 1924; House Report No. 1075 on H. R. 8206, 68th Cong., 2nd, Jan. 6, 1925; Confidential Print. Senate Judiciary, Letter Chief Justice Taft, March 11, 1922, on S. 3164, 67th Cong., 2nd Sess. Also Wm. Howard Taft, 35 Yale Law Journal, 1, 9.

Was there no duty below to grant a rehearing before the judges who were to decide the case, or else to certify? That neither was done would seem to warrant certiorari.

This brief is aimed principally at the validity of the judgment. It is contended that the judgment is not a judgment at all; that it is invalid by reason of lack of required concurrence and lack of real hearing. This is the question of the "how" of the case, the question of procedural or adjective law raised simultaneously by the four decisions below of October 1, 1945, of which the present case was one.

The statute controlling decisions of the Court of Claims provides "that the concurrence of three judges shall be necessary to a decision in any case," *id.* Rule 75 (b) of the Court of Claims, originally promulgated by the Supreme Court, now retained by the lower court of its own authority under the revised statute, provides that that court's "special findings shall be in the nature of a special verdict." This is a technical legal phrase and has great import here. The *nisi prius* in the Court of Claims is the body of judges who hear and try the case. They serve as a jury. Statute provides they may be the full bench of five, but not less than three. This is a legislative court, not a constitutional court. While a jury of twelve is done away with, virtually a jury of at least three is substituted, and, it is believed, the essential requisites for jurors, juries, hearings, hearing of oral arguments, independent judgments thereon, not the hearsay of other jurors, unanimous concurrence of the triers, and all the connotations of the words, trial, verdicts, and special verdicts, are here retained.

Verdict: *Roberts* v. *State,* 159 So. 373, 374; 26 Ala. App. 331. *State* v. *Ivanhoe,* 57 P. 317, 320; 35 Or. 150. 44 Words and Phrases 131. 27 Ruling Case Law, 834, § 2.

Special Verdict: *Hutchison* v. *Kelley,* 1 Rob. (Va.) 123. *Davis* v. *Chicago etc. R. Co.,* 93 Wis. 470. 24 LRA (N.S.) 1. Bouvier's Law Dictionary p. 3392, 3393. *United States* v. *Clark,* 94 U. S. 73, 75. *Collins* v. *Riley,* 104 U. S. 322, 327. *Ward* v. *Cochran,* 150 U. S. 597, 608. *United States* v. *New York Indians,* 173 U. S. 464, 474 and a number of cases there cited. *United States* v. *Esnault Pelterie,* 299

U. S. 201, 205. Do 303 U. S. 26, 28, 29, 30 and numerous citations there. *Natron Soda Co.* v. *The United States,* 55 Ct. Cls. 66, 67. Clementson "Special Verdicts".

Concurrence of judges: Unanimous verdict: *Denver & Rio Grand R. Co.* v. *Burchard,* 35 Col. 539, 9 Ann. Cas. 994. *Capital Traction* v. *Hof,* 174 U. S. 1, 15. *Ebbing* v. *Borough of Schuylkill Haven,* 244 Pa. 505.

Juror. Jury. 23 Words and Phrases 419, 423. *State* v. *Potts,* 20 Nev. 389. *State* v. *Voorhies,* 12 Wash. 53. *State* v. *McCarthy,* 76 NJL 295.

Submission: *Ridgely* v. *Carey, Md.,* 4 Har. & McH. 167, 174.

Hearing includes oral argument: Trial ditto: *People* v. *Raco,* 47 N. Y. S. 2d, 448, 449. *Freeman* v. *United States,* CCANY, 227 F. 732, 743. *Chaffee* v. *Rahr,* 40 NYS 2d, 484, 488. *State ex rel Arnold* v. *Common Council,* 157 Wisc. 505, 510-512. *Wisconsin Telephone Co.* v. *Public Service Com.,* 232 Wisc. 274, 294. *Mason* v. *State,* 26 Ohio CC 535. *Barton* v. *Burbank,* 138 La. 997. *Durden* v. *People,* 192 Ill. 493. *Clanton* v. *Ryan,* 14 Colo. 419, 424. *McKenney* v. *Wood,* 108 Me. 335, 337. *Labonte* v. *Lacasse,* 78 N. H. 489, 490. *Bridges* v. *California,* 314 U. S. 252, 271.

CONCLUSION.

Certiorari, it is believed, should be granted because:

As the judgment stands, neither the law of the case nor the facts of the case are made, but, from the contract sent up as evidence, this Court may construe the same and direct the court below to render judgment accordingly. Act of May 22, 1939.

Congress intended that Sections 3(a) and 3(b) of the Act of February 13, 1925, should both be used for the proper disposition of a case in the Court of Claims. Not even one review may be had of a judgment of the Court of Claims. These two sections of the Act together were intended to protect a claimant in his fundamental American traditional right to at least that much review of a question

of law as is necessary to the proper disposition of a case below. Whence, proper circumstances arising for use of Sec. 3(a) but not used, certiorari should issue.

The judgment below is invalid, there being no concurrence of three judges in the sense required by the statute, 18 Stat. Chap. 468, nor concurrence in the sense implied by Ct. Cls. Rule 75 (b), nor as connoted by the terms verdict, special verdict.

The judgment below is invalid because one of the judges, who supplied the third concurring vote, was absent from the trial, did not hear the oral argument, which is an essential part of a hearing and of a trial. The *nisi prius* is the court. Just as jurors who have not heard the arguments may not decide the verdict, neither may absentee judges in the Court of Claims.

The case was not submitted on the transcript of evidence and the briefs, but on the oral argument.

This Court has jurisdiction. The questions presented are Federal in nature, of real substance, of wide application affecting virtually every litigant in the Court of Claims, and in all other courts where the *nisi prius* is the court. What about a United States District Court judge absenting himself from the arguments? Is that any worse than one of three judges being absent especially when the three are required to concur by law? The question is certainly novel in the Court of Claims. It never arose before October 1, 1945. It should not be permitted to arise again. The purported decision is contrary to virtually every other decision in that court based on substitution of obligations. The lower court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Rule 38, par. 5 (b).

Respectfully submitted,

ALLEN POPE,
amicus curiae